In the Supreme Court of the United States

OCTOBER TERM 1972

No. -

RICHARD E. GERSTEIN,
State Attorney for the Eleventh
Judicial Circuit of Florida, in and for Dade County,
Petitioner,

VS.

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all
other similarly situated,
Respondents.

Response to Petition for Writ of Certiorari

ROBERT PUGH and NATHANIEL HENDERSON respond to the Petition for Writ of Certiorari filed by Petitioner, RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida.

The Respondents would state the initial question presented by the Petitioner in a different manner.

DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY[1]

Petitioner GERSTEIN asserts that the decision below, which answered the preceding question affirmatively, was erroneous. He contends that the decisions in *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom V. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962) compelled a negative answer. The respondents submit that the decision below correctly analyzed those cases and found them to be inapplicable. Moreover, the recent decision of this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1970); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Shadwick v. City of Tampa*, 407 U.S. 345 (1971) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) make it clear that the decision below was not erroneous.

However, respondents cannot dispute that the decision below presents an important question of federal constitutional law and that it conflicts with Florida law.

The due process and Fourth Amendment issues presented by the opinion below have never been determined by this Court. They are important issues because they are concerned with the deprivation of liberty prior to trial.

The conflict with Florida law presents the possibility of ongoing tension between the Florida and Federal courts unless the issue is resolved by this Court. Separate federal actions may now be brought against each of the state attorneys in Florida, seeking to compel compliance with the Court of Appeals decision below. Other states may be similarly affected.

The conflict which petitioner sees between the decision below and other Courts of Appeal decisions does not exist. (See Gerstein Petition, pp. 12-13). None of the Courts of Appeal cases cited confronted the precise question which the Fifth Circuit decided in this case.

* * * *

There are no reasons which would justify the exercise of certiorari on the comity question presented by Petitioner. The Petitioner has advanced none. He has written:

> *Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. (Gerstein Petition, p. 14).*

Thus, his comity argument is tied to his substantive argument. He concedes that if the Court below was correct in requiring preliminary hearings, it could act.[2] Therefore, only the due process and Fourth Amendment issues present questions for review.

CONCLUSION

Because the decision below does present an important constitutional question never decided by this Court, and because the decision below does conflict with the decisions and the Rules of the Florida Supreme Court, the respondents do not oppose certiorari.

Respectfully submitted,

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[1]In a cross-petition filed simultaneously with this response, PUGH and HENDERSON seek certiorari because the court below did not order probable cause hearings *immediately* after arrest.

[2]In any event the Fifth Circuit was clearly correct in holding that *Younger v. Harris*, 401 U.S. 37 (1970) was no bar. If *Younger* were applicable, this case would be an exception because of the presence of great and immediate irreparable injury (the loss of liberty) which could not be remedied by *any* action in Florida courts because of the consistent and adamant Florida position that an information obviated any right to a judicial determination of probable cause.